80-5589

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

PATRICK SIMPSON,

Petitioner

vs.

THE STATE OF GEORGIA,

Respondent

ON WRIT OF CERTIORARI

TO THE

COURT OF APPEALS

OF GEORGIA

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PETITION FOR WRIT OF CERTIORARI
TO THE
GEORGIA COURT OF APPEALS

Petitioner prays that a Writ of Certiorari issue to review the opinion and judgment of the Georgia Court of Appeals entered in the above case on June 2, 1980.

OPINION BELOW

The opinion of the Georgia Court of Appeals is reported at 154 Ga. App.,775(___SE2d___), and is set forth in Appendix "A".

JURISDICTION

The Judgment of the Georgia Court of Appeals was entered on June 2, 1980. Thereafter, the Supreme Court of Georgia denied a timely filed Petiti n for Writ of Certiorari on September 2, 1980. Copy of said denial is set forth herein in Appendix "B". The Court's jurisdiction is invoked under Title 28, United States Code §1257 (3).

QUESTION PRESENTED

Once a State Court had determined that probation is the appropriate punishment for a particular offender, and also imposes a fine to be paid on installments during the probationary period, may it, consistently with the Equal Protection and Due Process clauses of the Fourteenth Amendment,

revoke the probation where the evidence established that the offender was indigent and that the offender was not negligent in any manner, and did not deliberately disburse or dissipate monies that resulted in his inability to pay?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment to the United States Constitution as well as Georgia Code Annotated 27-2901, are set forth in Appendix "C" hereto.

STATEMENT OF THE CASE

PATRICK F. SIMPSON, hereinafter referred to as the petitioner, was placed on probation after being convicted of distribution of obscene materials. Simpson v. State, 144 Ga. App. 657. Petitioner's two (2) year probated sentence began to be served on August 21, 1978 under an order of probation requiring him to pay Five Hundred ($500.00) dollars per month until the Ten Thousand ($10,000.00) dollar fine was paid: (R-29, case No. 59871).

Petitioner on June 14, 1978 entered a plea of guilty to a charge of distribution of obscene materials and received a fine of Ten Thousand ($10,000.00) dollars and two (2) years on probation, and he was required to pay the fine at the rate of Five Hundred ($500.00) dollars per month. Therefore, both sentences were running concurrently, and the petitioner was to pay One Thousand ($1,000.00) per month on total fines of Twenty Thousand ($20,000.00) dollars. (R-44, case No. 59872.)

A petition for revocation was filed in each case and the sole ground for revoking the probation was that the petitioner failed to pay as directed. (R-45, case No. 59872) R-35, case No. 59871)

COURT OF APPEALS OF GEORGIA CASE NO. 59872

The first hearing was held on October 4, 1979 before Judge Dorothy T. Beasley. Steve Crawford, a probation officer, testified that Simpson had paid Two Hundred Ninety ($290.00)

dollars toward the fine of Ten Thousand ($10,000.00) dollars. (T-2) Petitioner's employer had written a letter to the judge and the probation officer in Brunswick stating that the petitioner was gainfully employed, doing a good job, and suggested a reduction in the fine. (T-3) Petitioner's employer also wrote a letter to the probation officer stating that Simpson was a good employee. (T-3)

The petitioner testified that he paid what he could afford, and that the company he had worked for when he was arrested assured him they would help. (T-4) Simpson testified his present take-home pay is Three Hundred Seventeen ($317.00) dollars every two weeks. (T-5) Because his roommate was not working due to a strike, he paid all the household bills which left him no money to pay on the fine. (T-6) Simpson stated he had no assets, and lives from pay check to pay check. (T-7)

Simpson testified that he tried to get a part-time job but none were available. (T-9)

The Court concluded that this petitioner violated the terms of the probation by not paying Five Hundred ($500.00) dollars per month as directed.

On November 1, 1979, another hearing was held and Steve Crawford gave the same testimony he had given at the October 4, 1979 hearing. Simpson's total payments on probation were One Thousand ($1,000.00) dollars per month (T-4), and the total payments were Two Hundred Ninety ($290.00) dollars.

The petitioner testified he had declared bankruptcy in January of 1978. (T-7) Petitioner's gross salary was about $600.00 per month up to June of 1979, and his net pay was about $525.00 per month. (T-8) He then received a raise of about $40.00 per month. (T-9) He had nothing left over from paying his expenses and he had no assets. (T-10) Simpson swore he did not squander any money, and on several occasions he had no money left to his next paycheck. (T-13) All his money went

r necessities, and he then detailed where his money went. (T-13-16) Simpson testified that before the raise his net pay was $596.00 per month and after it was $634.00 per month. (T-25-26).

No evidence or testimony was introduced nor was it shown that the petitioner was negligent in failing to pay his fine as directed. It was solely due to his indigency as to why he could not pay $500.00 per month on the fine imposed by Judge Beasley. The probation was revoked on the sole ground alleged in the petition for revocation that he failed to pay as directed, being $500.00 per month. (R-46)

COURT OF APPEALS OF GEORGIA CASE NO. 59871

A hearing was then held on November 1, 1979 before Judge William Alexander. Steve Crawford gave the same testimony as he had given before Judge Beasley. (T-8-12) The petitioner gave the same testimony that he had given before Judge Beasley. He lived from pay check and had no money left over to pay his fine. (T-17) The Court revoked his probation on the sole ground alleged in the petition for revocation that he failed to pay as directed, being $500.00 per month. (R-36)

REASON FOR GRANTING THE WRIT

I.

This Case Presents For Review An Issue Expressly Reserved By This Court In Tate vs. Short, 401 U.S. 395 (1971) and Williams vs. Illinois, 399 U.S. 235 (1970) - The Imprisonment of The Defendant For Failure To Pay A Fine On Installments Due To His Indigency After Being Placed On Probation.

In Tate vs. Short, 401 U.S. 395, 400 (1971), this Court stated that"

> "...Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in the circumstance must await the presentation of a concrete case."

In Williams vs. Illinois, 399 U.S. 235, 243 (1970), this court stated that:

"...We have no occasion to reach the question whether a State is precluded in any other circumstances from holding an indigent accountable for a fine by use of a penal sanction..."

This case appears to be the concrete case mentioned in Tate vs. Short, supra.

The Georgia Court of Appeals in Simpson vs. State, 154 Ga. App. 775 (___ SE2d___) held that for the reasons stated above, the court did not err in revoking defendant's probation even though his failure to pay the monthly installment of the fine was "not negligent or willful."

In Tate vs. Short, supra, this Court struck down a sentence that converted a fine into imprisonment due to the indigency of the defendant. Similarly in Williams vs. Illinois, supra, it was held that the term of imprisonment for an offense could not be extended beyond the maximum period fixed by law resulting directly from an involuntary nonpayment of a fine or court costs.

The fundamental question boils down to whether the sort of sentence an offender must serve may ever explicitly turn solely upon the amount of money he has. Griffin vs. Illinois, 351 U.S. 12, 19 (1956).

It is now clear that the conditional liberty of an offender who has been awarded probation is part of the library directly secured by the Fourteenth Amendment. Morrisey vs. Brewer, 408 U.S. 471 (1972); Gagnon vs. Scarpelli, 411 U.S. 617 (1973).

The evidence showed that the installment payments of $1000.00 per month on the fines were more than Simpson made in a month. Simpson's net pay was $634.00 a month. On these facts, the alternative offered the petitioner was, in effect, a nullity.

There is no "inverse discrimination" that is mentioned in Williams vs. Illinois, supra, and Tate vs. Short, supra, since the petitioner was serving his sentence on probation. He was reporting to his probation officer and was complying with the terms and conditions of his probation. He

was, in essence serving his sentence.

It should be pointed out that the fine is a judgement against the defendant, and the State can always levy against any property the defendant may own at a later time. Also, the State may file a garnishment against the salary of the defendant in order to collect the fine. Therefore, the petitioner is subject to paying the fine at a later time, and even after the probation period is over.

II.

There is a Conflict Between the Federal Courts And The State Courts.

In U.S. v. Boswell, 605 F.2d 171 (5th Cir. 1979), the Court held that a revocation of probation was erroneous if the defendant did not have the resources available, had no way to acquire them, and was not negligent or deliberate in allowing funds that he had to be disbursed or dissipated in a manner that resulted in his inability to pay. See also Barnett v. Hopper, 548 F.2d 550 (5th Cir. 1979), vacated as moot, Hopper v. Barnett, 439 U.S. 1041 (1978).

Similarly in U.S. v. Taylor, 321 F.2d 339 (4th Cir. 1963), the Court held that if the defendant was too poor to pay the fines, and was sincere in trying to pay the fines, his probation should not be revoked.

In U.S. v. Savage, 440 F.2d 1237, 1239 (5th Cir. 1971) the Court held that a defendant:

"cannot be held to be in violation of the condition (of his parole) unless he is clearly at fault."

The Court held that the District Court could not revoke appellant's probation unless it is positively and clearly shown that the failure to meet the condition was due to the appellant's neglect or default.

In Hensley v. U.S., 257 F.2d 61 (5th Cir. 1958), the probation was properly revoked since the defendant had fraudulently transferred assets to avoid the payment of taxes.

The above cited federal cases clearly reflect that in order to revoke the probation of the defendant, he must be negligent in not paying the installment payments, or willfully refuses to pay the fine.

Georgia refuses to follow the Fourth and Fifth Circuits and continually holds that probation can be revoked solely because of the indigency of the defendant.

This conflict should be resolved and this case is the proper case for this court to provide a uniform rule of law for the United States.

The petitioner has not been negligent, and has not surrendered a fair opportunity to make the required installment payments.

To imprison the petitioner when in the same circumstances a person of means would remain free constitutes a denial of the equal protection of the law. The confinement results from failure to pay a fine on installments being directly converted into imprisonment. The defendant who is involuntarily unable to pay is subjected to imprisonment solely because of his indigency.

The trial court has determined that the petitioner need not be confined for his crimes and that the State's penal interests would be met by a fine to be paid in installments and probation. (See Ga. Code Ann. §27-2901) This is an individualized sentence and the petitioner certainly has no quarrel with the court's essential judgment. But to revoke the probation due to his indigency is irrational, unnecessary, and impermissibly barred them from the benefits which the court adjudged them worthy of. This violates due process of law.

The State must accomodate his indigency and permit him the same escape from confinement open to a defendant of means under the same sentence. It cannot offer probation only to those who can pay.

Whether a person can pay a fine on installments had no apparent relationship to punishment or to rehabilitation.

Simpson was a mere clerk in a bookstore. The imposition of substantial fines on this type of person can only result in the revoking of the probation sooner or later. The trial courts were fully aware of the financial situation of the petitioner when imposing the sentence.

If the probation sentence can be revoked in this case, then the probation sentence was illusory and amounted to the trial judge giving the petitioner a test of liberty for several months, but in effect was eventually giving him a sentence to serve in prison. Under the holding of Morrisey vs. Brewer, supra, the State Court is required to keep the petitioner on probation as he was clearly not at fault in failing to comply with the terms of probation.

Since we have a national constitution, the application of the constitution should be uniform in both the state and federal courts.

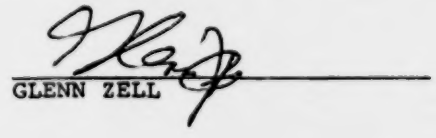
III.

This Court has granted certiorari in the case of Wood et al vs. Georgia, U.S. , 64 LE2d 807 (May 19, 1980, 79-6027) which involved the same issues as in this case. Therefore, the petition for Writ of Certiorari should be granted and remanded back to the Court of Appeals of Georgia after the Wood case has been decided.

CONCLUSION

This court needs to decide whether an indigent defendant's probation can be revoked where the monthly installments were not made due to his poverty and he was not negligent or willful in failing to pay as directed by the Court.

Respectfully submitted,



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vs.

THE STATE OF GEORGIA,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, PATRICK SIMPSON, ask leave to file the attached Petition for a Writ of Ceritorari to the Georgia Court of Appeals without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

GLENN ZELL, P.C.
Counsel for Petitioners

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PATRICK SIMPSON, Petitioner

vs.

STATE OF GEORGIA, Respondent

A F F I D A V I T

I, PATRICK SIMPSON, being first duly sworn according to law, deposes and says, in support of my Motion For Leave To Proceed without being required to prepay costs or fees:

1. I am the petitioner in the above entitled case.
2. Because of my poverty, I am unable to pay the costs of said cause.
3. I am unable to give security for same.
4. I believe that I am entitled to the redress I seek in said case.
5. The nature of said cause is briefly stated as follows:

I was sentenced in the State Court of Fulton County on a charge of violation of the State obscenity law. The present proceeding was commenced according to 28 U.S.C. 1257(3) on the grounds that my constitutional rights were violated when the trial court revoked my probation for failure to pay the fine due to my indigency.

Patrick Simpson
PATRICK SIMPSON

Sworn and subscribed to
before me, this 20
day of October, 1980.

Notary Public
Notary Public, Georgia State at Large
My Commission Expires July 11, 1981

JUN 2 1980

59871, 59872. SIMPSON v. THE STATE

QUILLIAN, Presiding Judge.

The defendant appeals from the revocation of his probated sentence to confinement.

Defendant was convicted in two separate prosecutions, of three counts each, of distribution of obscene material. In each instance he received a sentence of two years confinement and a fine of $10,000. The confinement was probated on the payment of the $20,000 in fines at the rate of $1,000 per month. He failed to make the monthly payments and his probation was revoked. He brings this appeal. Held:

1. It is alleged that the trial court converted the defendant's probated sentence of confinement to imprisonment solely because of his indigency, and such conversion "violates the equal protection and due process

clauses of the Fourteenth Amendment of the U. S. Constitution . . ." We do not agree.

Citing Williams v. Illinois, 399 U. S. 235 (90 SC 2018, 26 LE2d 586); Morris v. Schoonfield, 399 U. S. 508 (90 SC 2232, 26 LE2d 773); and Tate v. Short, 401 U. S. 395 (91 SC 668, 28 LE2d 130), defendant contends he has been "treated differently" because he is financially unable to pay his fine. He argues that under Griffin v. Illinois, 351 U. S. 12, 19 (76 SC 585, 100 LE2d 891), the "fundamental question boils down to whether the sort of sentence an offender must serve may ever explicitly turn solely upon the amount of money he has?" Answering the last question first, the U. S. Supreme Court stated: "The [Supreme] Court has not held that fines must be structured to reflect each person's ability to pay in order to avoid disproportionate burdens. Sentencing judges may and often do, consider the defendant's ability to pay, but in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate." San Antonio School District v. Rodriquez, 411 U. S. 1, 21 (93 SC 1278, 36 LE2d 16).

Contrary to defendant's argument, the trilogy of Williams-Morris-Tate, supra, does not prohibit the sentence imposed in the instant case nor the revocation of probation based upon the defendant's financial inability to pay the fine imposed. This legal triad proscribes typical sentences of $30 or 30 days, and the conversion of a fine into a sentence of confinement at a rate of so many dollars per day - which exceeds the maximum amount of confinement authorized by the statute. However, we have neither situation in the instant case. See Calhoun v. Couch, 232 Ga. 467 (2) (207 SE2d 455).

In essence, the Williams-Morris-Tate cases held that "the Due Process and Equal Protection Clauses protect persons like petitioner from inviduous discrimination" because of their indigency. See Griffin v. Illinois, 351 U. S. 1218, supra. Our Supreme Court, in Hunter v. Dean, 240 Ga. 214 (239 SE2d 791), thoroughly examined the issue of conditionally probated sentences upon payment of a fine and concluded that they are "not necessarily inviduous discrimination" even though defendant may be unable to pay the fine. See also Barnett v. Hopper, 234 Ga. 694 (217 SE2d 280).

Under Code Ann. § 27-2711 (Ga. L. 1956, pp. 27, 32; as amended through 1965, pp 413, 416), the sentence imposed in the instant case was within the permissible conditions of probation. The financial inability of the defendant to pay the monthly installment when due did not convert the monetary portion of the sentence to imprisonment, but merely invoked the previously imposed confinement portion of the sentence. This is not inviduous discrimination. Wood v. State, 150 Ga. App. 582, 583 (258 SE2d 171); Young v. State, 152 Ga. App. 108 (1) (262 SE2d 258); Calhoun v. Couch, 232 Ga. 467, 468, supra; Barnett v. Hopper, 234 Ga. 694, supra; Hunter v. Dean, 240 Ga. 214, supra. This enumeration is without merit.

2. For the reasons stated above, the court did not err in revoking defendant's probation even though his failure to pay the monthly installment of the fine was "not negligent or willful." See Hunter v. Dean, 240 Ga. 214, supra; Wood v. State, 150 Ga. App. 582 (2), supra.

Judgment affirmed. Shulman and Carley, JJ., concur

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta SEP 2 1980

Dear Sir:

Case No. 36557. Patrick F. Simpson
v. State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Pertinent provisions of the Fourteenth Amendment are:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Georgia Code Ann. §27-2901:

"Every fine imposed by the Court under the authority of this Code shall be paid immediately or within such reasonable time as the court may grant."